

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED BY CLERK

FEB -4 2008

COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,

Appellee,

v.

DAMIAN EARL MITCHELL,

Appellant.

2 CA-CR 2006-0348
DEPARTMENT A

MEMORANDUM DECISION

Not for Publication
Rule 111, Rules of
the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20051386

Honorable Charles S. Sabalos, Judge

AFFIRMED IN PART; MODIFIED IN PART AND REMANDED

Terry Goddard, Arizona Attorney General
By Randall M. Howe and William S. Simon

Phoenix
Attorneys for Appellee

Barton & Storts, P.C.
By Brick P. Storts, III

Tucson
Attorneys for Appellant

H O W A R D, Presiding Judge.

¶1 After a jury trial, appellant Damian Earl Mitchell was found guilty of unlawful imprisonment, child abuse committed with criminal negligence, and first-degree criminal trespass and aggravated assault with a deadly weapon or dangerous instrument, both dangerous nature offenses. After finding Mitchell to have had one historical prior felony

conviction, the trial court sentenced him to enhanced, presumptive terms of imprisonment, with concurrent terms for the unlawful imprisonment and child abuse convictions, the longest of which is 2.25 years, to be served consecutively to concurrent terms for the aggravated assault and criminal trespass convictions, the longest of which is 7.5 years.

¶2 Counsel has filed a brief in compliance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999), avowing he has reviewed the entire record but has found no arguable legal issue to raise on appeal. In compliance with *Clark*, counsel has provided “a detailed factual and procedural history of the case with citations to the record, [so] this court can satisfy itself that counsel has in fact thoroughly reviewed the record.” 196 Ariz. 530, ¶ 32, 2 P.3d at 97. Mitchell has filed a supplemental brief alleging the trial court erred by omitting jury instructions essential to his defense and by permitting testimony about his prior conduct that had not been previously disclosed. Mitchell also claims he was denied a fair trial by witness and juror misconduct. As addressed below, we have identified a discrepancy between the jury’s verdict and the trial court’s sentence on the conviction for unlawful imprisonment and remand the case for correction of that error. We otherwise affirm the convictions and sentences imposed.

Background

¶3 Viewing the evidence in the light most favorable to upholding the verdicts, *see State v. Tamplin*, 195 Ariz. 246, ¶ 2, 986 P.2d 914, 914 (App. 1999), the following facts were established at trial. On the night of January 7, 2005, Nicole C. was at home with her then-four-month-old daughter, Kaya, when Mitchell knocked on the door, and Nicole let

him in. Although paternity had never been established, Mitchell is believed to be Kaya's father, and he had acknowledged responsibility for her care. Nicole testified Mitchell had appeared drunk and angry that night and told Nicole he hated her and wanted to kill her. Nicole then ran to the telephone and called the home of Aireka C., who was her best friend and Mitchell's sister. Johnnie F., Aireka's boyfriend, answered the telephone and heard Nicole scream "help me" before the connection was lost. Mitchell had then pulled the telephone jack out of the wall socket in Nicole's apartment.

¶4 Mitchell asked Nicole about the call and then grabbed her hands and taped her wrists together with packing tape. According to Nicole, Mitchell threatened her repeatedly with a hammer, a knife, and a gun.

¶5 After Johnnie told Aireka about Nicole's telephone call, Aireka went to Nicole's apartment and heard Nicole crying as she proceeded up the stairs and knocked on the door. Aireka asked about Nicole and tried to convince Mitchell to leave Nicole's apartment, but Mitchell instead threatened to push Aireka down the stairs if she did not leave. Aireka then returned to her own apartment and called 911. After Aireka left Nicole's apartment building, Mitchell grabbed Nicole's car keys and walked her out of her apartment at gunpoint, leaving Kaya alone.

¶6 Mitchell then drove Nicole to the apartment where Aireka and Johnnie lived and entered the apartment by kicking in the front door. Nicole's wrists were still taped together, and she immediately went to Mitchell's mother, Nancy M., who was also in Aireka's apartment, and asked her to cut the tape. Mitchell started yelling at Aireka, asking

if she had called the police and then grabbed Johnnie and held a knife to his throat, saying that he was going to cut him. Eventually, police officers approached the apartment, and Mitchell told Nicole and Aireka to go to the back room and sit on the floor, which the women did until the police convinced Mitchell to leave with them.

Issues Raised on Appeal

¶7 In a rambling supplemental brief filed in propria persona, Mitchell appears to make the following claims: The court erred by failing to instruct the jury on justification defenses, presumably pursuant to A.R.S. §§ 13-404, 13-406, 13-415, and 13-1302; the court erred in failing to instruct the jury that assumption of lawful custody of a relative is a defense to unlawful imprisonment pursuant to A.R.S. § 13-1303(B)(2); the court erred in failing to instruct the jury, pursuant to § 13-1303(C), to consider whether Mitchell had voluntarily released Nicole without physical injury in a safe place prior to his arrest; the court erred by failing to exclude evidence of Mitchell's prior acts that had not been previously disclosed; witness misconduct occurred when Nicole telephoned Aireka and talked about the trial the night before Aireka testified; and juror misconduct occurred in a conversation by two jurors overheard by court staff. We address these arguments in turn.

a. Jury Instructions

¶8 Mitchell seems to be arguing that the court erred in failing to instruct the jury about defenses and factors in mitigation relevant to the charges of unlawful imprisonment and aggravated assault. Because Mitchell proposed no such instructions at trial, he has forfeited these claims absent fundamental error. *See State v. Martinez*, 210 Ariz. 578, n.2,

115 P.3d 618, 620 n.2 (2005) (“[D]efendants who fail to object to an error below forfeit the right to obtain appellate relief unless they prove that fundamental error occurred.”). Fundamental error is found only in “those rare cases that involve ‘error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial.’” *State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005), *quoting State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). To prevail under a fundamental error review, “a defendant must establish both that fundamental error exists and that the error in his case caused him prejudice.” *Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607. Mitchell has failed to show there was error, much less fundamental error, in the omission of the instructions he now claims should have been given.

¶9 Relying on § 13-415, Mitchell apparently contends he was entitled to a jury instruction on self-defense, pursuant to § 13-404, or defense of another, specifically Kaya, pursuant to § 13-406. Section 13-415 provides:

If there have been past acts of domestic violence as defined in § 13-3601, subsection A against the defendant by the victim, the state of mind of a reasonable person under §§ 13-404, 13-405 and 13-406 shall be determined from the perspective of a reasonable person who has been a victim of those past acts of domestic violence.

By reference, § 13-415 pertains to the reasonableness of a defendant’s belief that physical force was immediately necessary to protect himself or a third person against another’s use or attempted use of unlawful physical force. §§ 13-404(A), 13-406. Mitchell seems to argue he was entitled to an instruction based on § 13-415 because evidence at trial suggested

Nicole had acted violently toward him in the past and he and Johnnie had sometimes argued. Such evidence was insufficient to warrant a justification instruction.

¶10 In Arizona, “a self-defense instruction will be given only if the defendant can demonstrate the following three elements: (1) he reasonably believed he was in immediate physical danger; (2) he acted solely because of this belief; and (3) he used no more force than appeared reasonably necessary under the circumstance.” *State v. Dumaine*, 162 Ariz. 392, 404, 783 P.2d 1184, 1196 (1989). Although “[e]ven the slightest evidence of self-defense mandates an instruction on the issue,” that evidence must tend to prove “a hostile demonstration, which may reasonably be regarded as placing the accused apparently in imminent danger of losing [his] life or sustaining great bodily harm.” *Id.*, quoting *State v. Lujan*, 136 Ariz. 102, 104, 664 P.2d 646, 648 (1983). In other words, there must be evidence of “some overt act” that a defendant perceived as an immediate threat to himself or another before a jury will be instructed that otherwise assaultive conduct may be justified under § 13-404 or § 13-406, *id.*, or that it is required to consider whether the defendant’s perceptions were reasonable under § 13-415. *Cf. State v. Vogel*, 207 Ariz. 280, ¶ 27, 85 P.3d 497, 502 (App. 2004) (§ 13-415 does not negate § 13-404(B)(1), which provides use of force not justified in response to “verbal provocation alone”). Here, there was no evidence suggesting Nicole or Johnnie had committed an overt act placing Mitchell or anyone else in imminent danger that night; therefore, justification instructions were not warranted. *See State v. Ruggiero*, 211 Ariz. 262, ¶ 10, 120 P.3d 690, 692-93 (App. 2005) (justification instruction should not be given “unless reasonably and clearly supported by

the evidence”), *quoting State v. Walters*, 155 Ariz. 548, 553, 748 P.2d 777, 782 (App. 1987).

¶11 Mitchell’s claims that other jury instructions were erroneously omitted—even though he failed to request them at trial—are similarly without merit. Mitchell contends the jury should have been instructed that each of the following circumstances constituted an affirmative defense to charges of unlawful restraint: “The defendant is a relative of the person restrained and the defendant’s sole intent is to assume lawful custody of that person and the restraint was accomplished without physical injury,” § 13-1303(B)(2); “the victim is released voluntarily by the defendant without physical injury in a safe place prior to arrest,” § 13-1303(C); and “the defendant [i]s a victim of domestic violence by the other parent and has a good faith and reasonable belief that the child will be in immediate danger if the child is left with the other parent,” § 13-1302(C)(2)(b).

¶12 Although Mitchell is correct that § 13-1303(B)(2) states an affirmative defense to unlawful imprisonment, the instruction would not have been supported by the evidence presented. Mitchell is not a relative of Nicole’s, as that term is defined in A.R.S. § 13-1301(1), and no evidence suggests a lawful basis for his assertion of custody of her.

¶13 Section 13-1303(C) is not a defense to unlawful imprisonment but provides a lower classification for the offense when a defendant voluntarily releases his victim to a safe place without physical injury. *Id.* This provision, like an analogous provision for the offense of kidnapping, “deals entirely with classifications of punishment” and describes “a mitigating factor relevant solely for sentencing purposes.” *See State v. Eagle*, 196 Ariz. 188,

¶¶ 8, 17, 994 P.2d 395, 397, 399 (2000) (construing § 13-1304(B)). Moreover, a court is not required to submit an interrogatory to the jury on the issue of voluntary release when that theory is not supported by the evidence. *See State v. Mendibles*, 126 Ariz. 218, 219, 613 P.2d 1274, 1275 (App. 1980) (“voluntary release” interrogatory not warranted where victim’s cries attracted attention of neighbor and victim escaped). Here, Mitchell did not “release” Nicole at Aireka’s apartment but, as evidenced by his command that she “go to the back and sit on the floor” before the police arrived, continued to confine her.

¶14 Section 13-1302(C) describes a defense to the crime of custodial interference available to domestic violence victims. It is not relevant here because Mitchell was not charged with that offense, and, in any event, he did not have “the right of custody” of Kaya, as required by § 13-1302(C)(2). *See* § 13-1302(B) (“If a child is born out of wedlock, the mother is the legal custodian of the child for the purposes of this section until paternity is established and custody or access is determined by a court.”).

b. Testimony of Past Acts

¶15 Mitchell contends the trial court erred in permitting Nicole to testify about past instances of domestic violence between the couple that had not been previously disclosed. Because he objected to this testimony at trial, we first determine whether there was error and, if so, then decide if the error was, beyond a reasonable doubt, harmless. *See Henderson*, 210 Ariz. 561, ¶ 18, 115 P.3d at 607.

¶16 In opening statements, the prosecutor described the relationship between Mitchell and Nicole as “on-again, off-again,” and Mitchell’s counsel told the jury:

Turbulent is an understatement of the nature of [Mitchell's and Nicole's] relationship. There was constant bickering, constant arguing; and Aireka is going to describe a bunch of events, and I think Nancy, Aireka and [Mitchell]'s mom, are going to describe some events where it is very clear that . . . Nicole is not this demure, fragile young woman. You're going to hear that and Nicole is just the opposite. That she's quite aggressive.

. . . .

January 8, [Mitchell] was confronted with an argument that escalated, a screaming match between him and Nicole. . .

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. . . .

[Mitchell] did not realize that that argument was going to escalate, and escalate it did. Oh, yeah. It escalated, and you're going to hear a lot about what caused that argument to escalate.

¶17 Nicole was called to the witness stand immediately after this opening statement, and the prosecutor asked her to describe her relationship with Mitchell and whether she had ever been violent toward him. Nicole testified she had hit Mitchell with a desk lamp during an argument she and Mitchell had had about his family living in Nicole's apartment when she was pregnant, limited to bed rest, and unable to work. When asked about any other instances of violent behavior toward Mitchell, Nicole began to recount an occasion when she hit or kicked Mitchell in self-defense after he had thrown her to the ground and began kicking her.

¶18 Mitchell's counsel objected on the ground that Nicole was testifying about Mitchell's "other acts," subject to exclusion pursuant to Rule 404(b), Ariz. R. Evid., which

had not been disclosed in accordance with Rule 15.1(b), Ariz. R. Crim. P. The prosecutor argued defense counsel had opened the door to Nicole's testimony by telling the jury she would present evidence of "other events" in which Nicole had been the aggressor and by suggesting that Nicole had been "very aggressive" and in need of "control" on the night of January 7.

¶19 The trial court found that Nicole's testimony involved "uncharged conduct for which there was no disclosure" but overruled defense counsel's objection "in view of the opening statement of defense counsel that there may be some evidence that she is an aggressive person and the aggressor in this situation." The trial court also admonished the jury that Mitchell was "not charged with any offense not alleged in this indictment," that the jury was to "make its decision based on the evidence concerning the alleged conduct of the defendant on January 8, 2005, together with all the other evidence that is admitted."

¶20 In light of defense counsel's opening statement, we do not believe the court abused its discretion in permitting Nicole to explain past acts of physical aggression against Mitchell. Nicole's challenged testimony was only made relevant by Mitchell's implicit claim, in his opening statement, that his conduct was justified. Mitchell had never disclosed an intention to raise a justification defense, as required by Rule 15.2(b), Ariz. R. Crim. P., and as addressed in ¶ 10, *supra*, such a defense would not have been supported by the evidence.

¶21 Moreover, any error in admission of this evidence would be correctly characterized as invited error, and, in any event, we find no evidence of prejudice resulting

from Nicole’s testimony. *See State v. Doerr*, 193 Ariz. 56, ¶ 27, 969 P.2d 1168, 1175 (1998) (“rule of invited error applies when a party elicits evidence or comments that ‘make otherwise irrelevant evidence highly relevant or require some response or rebuttal,’” *quoting Pool v. Superior Court*, 139 Ariz. 98, 103, 677 P.2d 261, 266 (1984)); *State v. Hoskins*, 199 Ariz. 127, ¶ 57, 14 P.3d 997, 1012-13 (2000) (conviction not reversed for erroneous admission of evidence unless reasonable probability verdict would have been different in absence of evidence).

c. Alleged Witness Misconduct

¶22 Mitchell also seems to be arguing he was deprived of a fair trial based on evidence that Nicole had telephoned Aireka after the first day of trial, had told Aireka about Mitchell’s opening statement, and had asked Aireka if she believed Nicole was “a violent and mean person.” Although Mitchell argues this was a violation of the court’s order regarding communication between witnesses, Mitchell’s counsel had not requested the exclusion of witnesses pursuant to Rule 9.3(a), Ariz. R. Crim. P., until the second day of trial, and the record does not reflect that witnesses had previously been admonished to refrain from communicating with each other about the trial. Because Nicole had telephoned Aireka the day before the court’s order was in place, we cannot say these witnesses violated Rule 9.3.

¶23 Moreover, Mitchell did not challenge the admissibility of any testimony based on the communication between these witnesses and has forfeited the right to challenge all but fundamental error. *See Martinez*, 210 Ariz. 578, n.2, 115 P.3d at 620 n.2. Counsel had

the opportunity to question Nicole and Aireka fully about the conversation and to inquire about any improper influence on Aireka's testimony, all in the presence of the jury, and Mitchell does not suggest how he was prejudiced by the testimony. We find no abuse of discretion in the court's admission of the women's testimony, much less fundamental error, and no resulting prejudice. *See State v. Gulbrandson*, 184 Ariz. 46, 63, 906 P.2d 579, 596 (1995) (admission of testimony after Rule 9.3 violation within court's discretion; no reversal absent abuse of discretion and resulting prejudice).

d. Alleged Juror Misconduct

¶24 Mitchell also raises a claim of juror misconduct. On the third day of trial, the court learned two of the jurors had been overheard in conversation, and one of the jurors had reportedly remarked, in a disparaging way, that Nicole reminded her of her son's girlfriend. After consulting with counsel, the court examined the two jurors, who stated their conversation was unrelated to the trial and would not affect their impartiality or ability to decide Mitchell's case based only on the law and the evidence. Mitchell's counsel did not move for a mistrial or seek dismissal of the jurors, and we therefore review the issue only for fundamental error. *See Martinez*, 210 Ariz. 578, n.2, 115 P.3d at 620 n.2.

¶25 We find no abuse of discretion, let alone fundamental error, in the trial court's resolution of this communication between jurors. *See State v. Jones*, 185 Ariz. 471, 484, 917 P.2d 200, 213 (1996) (denial of mistrial for alleged improper influence on jury not reversed absent clear abuse of discretion and actual or presumed prejudice). In addition, Mitchell has failed to show any actual prejudice arising from this communication, and

because no juror received or considered extrinsic evidence, we will not presume prejudice. *See id.*; *State v. McLoughlin*, 133 Ariz. 458, n.2, 652 P.2d 531, 534 n.2 (1982) (distinguishing juror’s receipt of evidence from outside source that may warrant new trial from reliance on own “common sense and experiences”); *cf. State v. Miller*, 178 Ariz. 555, 558-59, 875 P.2d 788, 791-92 (1994) (prejudice presumed if jury received and considered extrinsic evidence).

Fundamental Error Review

¶26 Pursuant to our obligation under *Anders*, we have reviewed the record in its entirety and are satisfied the evidence is sufficient to establish the elements of the offenses for which Mitchell was found guilty. *See* A.R.S. §§ 13-1203, 13-1204, 13-1303, 13-1504, and 13-3623(A)(3). We find no error warranting reversal of Mitchell’s convictions.

¶27 We have, however, identified an error in the court’s formal judgment and sentence of imprisonment. At sentencing, the trial court convicted Mitchell of unlawful imprisonment as a dangerous nature offense and sentenced him to an enhanced term of imprisonment based on the finding of dangerousness. This judgment and sentence is inconsistent with the jury’s verdict that the state had not proven the dangerous nature of the unlawful restraint Mitchell had committed.¹ The imposition of an illegal sentence is fundamental error. *State v. Thues*, 203 Ariz. 339, ¶ 4, 54 P.3d 368, 369 (App. 2002). Accordingly, we remand the case for resentencing.

¹Consistent with *Penson v. Ohio*, 488 U.S. 75, 83-84 (1988), and *State v. Clark*, 196 Ariz. 530, ¶ 30, 2 P.3d 89, 96 (App. 1999), we requested further briefing on this issue. The state has conceded error.

Conclusion

¶28 For the foregoing reasons, we affirm Mitchell's convictions and sentences for aggravated assault, child abuse, and criminal trespassing but modify the conviction for unlawful imprisonment to remove the dangerous nature designation and remand the case for sentencing consistent with the jury's verdict.

JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

JOHN PELANDER, Chief Judge

J. WILLIAM BRAMMER, JR., Judge